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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1928

No. 529 12

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS et al.,

Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

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SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	5
THE CALIFORNIA HIGHWAY SYSTEM IN GENERAL	5
THE STATE ACTS OF 1923 AND 1927 DO NOT EXACT A "TOLL" WITHIN THE MEANING OF THE FEDERAL AID AND HIGHWAY ACTS	13
THE FEDERAL AID ACT AND THE FEDERAL HIGHWAY ACT HAVE NOT BEEN VIOLATED	23
THE FEDERAL GOVERNMENT HAS ACQUIESCED IN THE ACTION OF CALIFORNIA AND OTHER STATES	33
APPELLANTS HAVE NO STANDING IN COURT	36
THE STATE LAW IS CONSISTENT WITH THE FOURTEENTH AMENDMENT	37
THE STATE LAW IS CONSISTENT WITH THE STATE CONSTITUTION	37
1. THE REFUND PROVISION	38
2. THE ONE PER CENT PROVISION	40
3. THE FORTY-FIVE DAY PROVISION	41
4. THE PROVISIONS OF THE STATE LAW UNDER ATTACK ARE SEPARABLE	42
5. THE TITLE OF THE STATE LAWS IS SUFFICIENT	43
6. THE DISTRIBUTION OF THE REVENUE UNDER THE STATE LAW	43
INJUNCTIVE RELIEF SHOULD BE DENIED	45
APPENDIX	49
MOTOR VEHICLE FUEL TAX LAWS	49
Sec. 2, Art. XVI, Constitution of California	63
Statutes of California, 1913, page 461	67
Statutes of California, 1919, page 138	71
Statutes of California, 1923, page 123	72
Section 4041 of the Political Code of California	74

CASE INDEX

	Page
Altitude Oil Co. vs. People (Colo.), 202 Pac. 180	22
Amos vs. Gunn (Fla.), 94 So. 615	22
Anthony vs. Kozer, 11 Fed. (2d) 641, 47 S. Ct. 334	24
Askren vs. Continental Oil Co., 252 U. S. 444	20
Bowman vs. Continental Oil Co., 256 U. S. 642	20, 37
Buck vs. Kuykendall, 45 S. Ct. 324 (325)	20
Cal. Juris., Vol. 19, p. 16	11
Cal. Juris., Vol. 29, pp. 363–7	11
Carley & Hamilton vs. Snook, etc., No. 2274-L, In Equity, District Court of U. S., Northern Dis., So. Div.	44
Carson City vs. Red Arrow Garage (Nev.), 225 Pac. 487	22
Clark vs. Titusville, 184 U. S. 329	21
Chicago Motor Club vs. Kinney, 160 N. E. 163	21
Cunningham vs. Potts, 9 Fed. (2d) 469	23, 37
Ellis vs. Stephens, 185 Cal. 720	12
Foster & Creighton Co. vs. Graham (Tenn.), 285 S. W. 570	22
Gafill vs. Bracken (Ind.), 145 N. W. 312	22
Grayburg Oil Co. vs. State (Tex.), 286 S. W. 489	22
Hart Refineries vs. W. E. Harmon, 263 Pac. 687	22, 37
No. 210 U. S. Supreme Court, October Term, 1928	20
Hendrick vs. Maryland, 235 U. S. 610	20
In the Matter of Schuler, 167 Cal. 252	34
In the Matter of Stork, 167 Cal. 294	34
Kane vs. New Jersey, 244 U. S. 160	20
Liberty Highway Co. vs. Michigan Public Utilities Commission, 294 Fed. 703	28
Martine vs. Kozer, 11 Fed. (2d) 645	27
Michigan Public Utilities Commission vs. Duke, 45 S. Ct. 191	20
Morris vs. Duby, 47 S. Ct. 548	29
Montgomery vs. Railway Co., 104 Cal. 186	11
Old Homestead Bakery vs. Marsh, 75 Cal. App. 247	16
Panhandle Oil Co. vs. Mississippi, 48 S. Ct. 451	19
People vs. General Petroleum Corp., 75 C. D. 767	18, 43
People vs. Richfield Oil Co., 75 C. D. 766	18
People vs. Richfield Oil Co., 76 C. D. 45	18
People vs. Sterling Refining Co., 261 Pac. 1080	18, 43
People vs. Ventura Refining Co., 75 C. D. 759	18

CASE INDEX—Continued

	Page
Pierce Oil Corp. vs. Hopkins, 44 S. Ct. 251	19, 37
Pierce Oil Corp. vs. Hopkins, 282 Fed. 253 (255)	21
Portland vs. Kozer (Ore.), 217 Pac. 833	22
Sanger vs. Lukins, 24 Fed. (2d) 226	28, 37
Silver vs. Louisville etc. Co., 213 U. S. 175	37
Smallwood vs. Jeter, 244 Pac. 149	28
Standard Oil Co. vs. Brodie, 239 S. W. 753	37
Standard Oil Co. vs. Jones (S. D.), 205 N. W. 72	22
State vs. Hart (Wash.), 217 Pac. 45	22
State vs. Liberty Oil Co. (Ind.), 97 So. 438	22
State vs. Oligney, 202 N. W. 893 (896)	29
State of Mississippi vs. Panhandle Oil Co., 147 Miss. 663	22
Viquesney vs. Kansas City (Mo.), 266 S. W. 700	22
Western Union Telegraph Co. vs. Hopkins, 160 Cal. 106	11

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Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

This is a proceeding in equity in which the appellants, who allege themselves to be operators of motor vehicles over the public highways in the State of California, seek to enjoin the appellee, as State Controller, from disbursing and causing to be expended revenue collected by the state under the Motor Vehicle Fuel Tax Acts of 1923 and 1927.

The theory of suit is that the said Motor Vehicle Fuel Tax acts violate that provision of the Federal Aid Act of 1916 and the Federal Highway Act of

1921 to the effect that all highways constructed or reconstructed thereunder be free from tolls of all kinds; that the states acts are contrary to the equal protection of the law and the due process of the law clauses of the fourteenth amendment; and that they offend against certain provisions of the constitution of California.

Sitting under section 266 of the Judicial Code, the court below denied injunctive relief and granted a motion to dismiss the bill of complaint. The proceeding comes to this court by direct appeal.

STATEMENT OF THE CASE

In 1923, the legislature of California passed an act regulating and licensing the business of producing, refining or distributing motor vehicle fuel (Stats. 1923, p. 571). As amended (Stats. 1925, p. 659, and Stats. 1927, p. 308) it requires every "distributor," as therein defined, to pay to the state in quarterly installments a license tax for the privilege of engaging in such business, in an amount computed at two cents per gallon of motor vehicle fuel.

That act is fully and accurately set forth in the appendix to this brief. A portion only of that act is appended to appellants' brief, but it is inaccurate in many respects.

In 1927, the legislature of California passed a second act to regulate and license the said business, adding a tax of one cent to the two-cent license tax provided for in the 1923 act. The only essential differ-

ence between the two acts is that the revenue derived from the earlier act is available for construction, reconstruction and maintenance of public highways, while the proceeds of the 1927 tax must be expended exclusively in construction and improvement.

In 1916, congress enacted the Federal Aid Act (39 Stat., p. 355), authorizing the federal government to cooperate with the states in the construction of rural post routes. The act requires the formal assent of the state; declares all public roads to be post routes; defines the term "rural post road" to mean any public road over which the United States mails are transported, excluding every street and road in a place having a population of 2500 or more, except that portion of any such street or road in which t houses average more than 200 feet apart; and provides that all roads constructed under the provisions of that act "shall be free from tolls of all kinds."

The State of California, by legislative act, assented in 1917 to the terms of the Federal Aid Act. (Chap. 29, Stats. of Cal., 1917.)

Further authority for additional appropriations was extended by congress through the enactment of the Federal Highway Act in 1921 (42 Stat. 212). Therein it is expressly provided that federal aid moneys may be expended only in construction and reconstruction of "highways," which are defined to exclude any street in a municipality having a population of 2500 or more, except that portion thereof in which, within a distance of one mile, the houses

average more than 200 feet apart; and it is also stated therein that

> "all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds."

Continuance of cooperative highway work by the federal and state governments, following a departmental reorganization in this state, is provided for in section 365*i* of the Political Code (Stats. of Cal. 1925, p. 386).

Appellants plead that they are operators of motor vehicles on the public highways in this state; that they must pay in advance the taxes imposed by the Motor Vehicle Fuel License Acts of 1923 and 1927 before operating on federal aided highways; and that said taxes are in addition to the purchase price of the fuel with which their vehicles are operated. (Tr. p. 7.)

It is alleged by appellants that the appellee has collected large sums of money under said acts of 1923 and 1927 (Tr. p. 8); and that the federal government has paid to the state large sums of money to be expended in accordance with the federal acts of 1916 and 1921. (Tr. p. 3.)

It is averred that the fuel taxes are "tolls" within the meaning of the Federal Aid and Highway Acts and can not be legally disbursed by the state; that the collections by the state under the licensing acts of 1923 and 1927 are in violation of the fourteenth amendment to the federal constitution; and, also,

that they contravene certain provisions of the constitution of California, to which a detailed reference will hereafter be made. (Tr. p. 9.)

Accordingly, appellants pray that appellee be restrained from disbursing collections under the state acts of 1923 and 1927 and that such moneys be impounded, also that the appellee be permanently restrained from enforcing the provisions of said acts.

The motion of appellee to dismiss the bill of complaint comprehends special grounds of objection as well as a general demurrer, but upon the hearing of the application for an interlocutory injunction the appellee relied only upon his general demurrer, and that only is his basis of resistance upon this appeal.

ARGUMENT

The California Highway System in General.

Section 36, article IV of the constitution of California, adopted in 1902, declares that

> "The legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway."

Prior to 1909 there was no definite provision for a state highway system, and theretofore all moneys expended by the state in the construction or maintenance of public highways were paid out of the

general fund of the state by legislative appropriation.

The State Highway Act of 1909 (Chap. 383, Stats. of California for 1909) provided for the first state highway bond issue of $18,000,000 for the acquisition and construction of a system of state highways. That act was adopted by the people at the general election in 1910.

The State Highways Act of 1915 (Chap. 404, Stats. of California for 1915) provided for the second state highway bond issue of $15,000,000 and for certain extensions of the original state highway system. It was approved by the people at the general election in 1916.

Section 2 of article XVI of the constitution of California was adopted at a special state election in 1919 (Chap. 46, Stats. of California for 1919) and provided for a state bond issue of $40,000,000 for the construction of certain additional state highways. (See Appendix.)

California's first Motor Vehicle Act was enacted in 1913 (Chap. 326, Stats. of California of 1913), regulating the use and operation of vehicles upon the "public highways," defined therein to

> "include any highway, county road, state highway, county road, state highway or state road, public street, avenue, alley, park, parkway, driveway, or public place in any county or incorporated city and county, city or town."

Fees and licenses collected thereunder were placed in a "Motor Vehicle Fund." One-half of the col-

lections were returned to the counties from which they were received to be paid into the county road funds (section 36), and the balance remaining after the payment of administrative expenses was set apart for the maintenance of state highways. (Section 39.)

The Motor Vehicle Act of 1913 was replaced by the Motor Vehicle Act of 1915 (Stats. 1915, p. 397). One-half of the collections thereunder was given to the counties in proportion to the number of vehicles registered, to be deposited in the county road funds and to be expended by the counties exclusively in the construction and maintenance of public roads, bridges and culverts in the counties, with power in the county supervisors to expend any portion in the construction, maintenance and repairs of streets, bridges and culverts within incorporated cities. The other half, after payment of administrative expenses, was retained by the state for the maintenance, repair, widening, preservation and reconstruction of state roads under the jurisdiction of the State Highway Department. (Section 159.)

The Motor Vehicle Act of 1915 was replaced by the California Vehicle Act of 1923 (Stats. of 1923, p. 517). Section 21 thereof defines "public highway" to include every highway or road intended to be or used by the general public, including those within municipalities. Collections thereunder are expended in substantially the same manner as in the Motor Vehicle Act of 1915 (section 159). Fines and

forfeitures collected in cities through arrests effected by city officers or employees are placed in a city "street improvement fund" to be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within the city. The act of 1923, as amended in 1925 (Chap. 240), and as amended in 1927 (Chaps. 752, 844 and 854), is now in force.

Section 13 of the Motor Vehicle Fuel Tax Act of 1923 provides that one-half of the collections thereunder, after payment of refunds, shall be paid to the counties of the state in the proportion which the number of vehicles registered in each county bears to the total number of such vehicles, and the amount apportioned to the counties shall be expended exclusively "in the construction and maintenance of roads, bridges and culverts in each such county" (section 13). The other half of the collections is paid into the "State Highway Maintenance Fund" and is made available for the maintenance and reconstruction of the state highways.

Moneys collected under the Motor Vehicle Fuel Tax Act of 1927, less one-third of the refunds, are credited to the "State Highway Construction Fund" and are available for the construction and improvement of state roads and highways in accordance with chapter 794 of the Statutes of California for 1927.

In 1923, the legislature of California passed the so-called Motor Vehicle Transportation License Act, under which persons using any public highway in

the state for compensation were subjected to a license tax computed at the rate of four per cent of the gross receipts from operation, less the amount paid by an operator for county or municipal licenses or taxes upon his operative property. All sums collected thereunder were appropriated, one-half to the state for the maintenance and repair of "public highways" and one-half to the counties upon the basis of the number of motor vehicles registered, to be expended exclusively in the maintenance and repair of "public highways" within the county. (Section 8.)

The Motor Vehicle Transportation License Act of 1923 was superseded by the Motor Vehicle Transportation Act of 1925 (Chap. 412, Stats. of 1925). In so far as the provisions noted in the 1923 act were concerned they were repeated in substance in the act of 1925. The act of 1925 was repealed as of January 1, 1928 (Chap. 843, Stats. 1927).

In November, 1926, the people adopted section 15 of article XIII of the constitution of California, by which all persons and companies engaged in the business of transporting persons and property as common carriers for compensation "over any public highway in this state" between fixed termini or over a regular route are subjected to an annual state property tax upon their operative property computed at the rate of 4½ per cent of the gross receipts from operation, in the case of passenger carriers, and at the rate of 5 per cent in the case of freight carriers.

Such taxes are in lieu of all other taxes and licenses, state, county and municipal, on the said operative property. The revenues under that section are appropriated, one-half to the state to be devoted exclusively to the maintenance and repair of "public highways within the state," and the other half to the counties upon the basis of the number of registered motor vehicles to be devoted exclusively to the maintenance and repair of "public highways within such county." That section is in full force and is carried into effect by section 3664*aa* of the Political Code of California.

As noted, the legislature is empowered by the constitution to declare "*any* road a state highway" (Sec. 36, Art IV), which means that any city street may be made a link in the state highway system. By legislative act the state may aid in the construction and maintenance of highways in counties and towns (Stats. 1913, p. 461). Conversely, counties and cities are authorized to perform street work upon the highways under the control of the state (Stats. 1919, p. 138). The state has authorized counties to improve or assist in the improvement of streets lying within municipalities. (Stats. 1923, p. 123; Section 4041 (4) Political Code.) (These statutes are appended hereto.)

"Public highways" are defined by section 2618 of the Political Code of California as follows:

> "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places,

trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property."

The term "public highway," accorded its ordinary and generally accepted meaning, includes so-called city streets.

Section 2618 Political Code of California;
Montgomery vs. *Railway Co.*, 104 Cal. 186;
Western Union Telegraph Co. vs. *Hopkins*, 160 Cal. 106;
Vol. 19, Cal. Juris., p. 16;
Vol. 29, Cal. Juris., p. 363-7.

This general, but not exhaustive, survey of the highway system in this state shows that federal aid for construction and reconstruction of certain highways within the states became available long after the State of California had gone far with its program of not only constructing and reconstructing, but also repairing and maintaining *all* public highways within this state, including so-called state highways, county highways *and city streets*. Millions of dollars had been expended or had become an obligation of the state, in the course of a comprehensive public highway plan, long before the limited federal aid became available.

Long before the enactment of the federal road aid acts there was a network of public highways throughout California, all of which the state and its governmental agencies had constructed and maintained

without federal assistance. Ever since the enactment of the Federal Aid Act of 1916, and long prior thereto, the State of California and its subordinate agencies have constructed and maintained public highways within municipalities of every size, and under the law of the state, as it now stands, the state has the obligation of constructing and maintaining public highways in all municipalities, regardless of their population.

Before the passage of the federal road aid legislation the state and its political subdivisions had the entire burden of maintaining, as well as constructing, all public highways, and the burden of maintenance was not lifted or shared by the federal legislation for, as noted, the contribution of the federal government is for construction and reconstruction exclusively.

Unaided, the state, and its units, must find ways and means for the maintenance of all public highways. Unaided, it must also find ways and means for the construction and reconstruction of all public highways. With limited federal aid it must find ways and means for the construction and reconstruction of those highways upon which federal moneys may be expended.

Federal aid, to the limited extent to which it is available, is in practice given when the Secretary of Agriculture finds that any project approved by him has been constructed or reconstructed in accordance

with the act of Congress, though that official may in his discretion arrange for progress payments.

42 Stat. 215;
Ellis vs. *Stephens,* 185 Cal. 720.

The State Acts of 1923 and 1927 do Not Exact a "Toll" Within the Meaning of the Federal Aid and Highway Acts.

The Motor Vehicle Fuel Tax Act of 1923 is entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate, and other motor vehicle fuels * * *."

The term "motor vehicle" as therein used is defined to include every vehicle operated upon "the highways of this state" which is propelled by the use of motor vehicle fuel. (Section 1.)

A "distributor" is defined in section 1 to include

> "Every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in

such original package or container in which the same was imported or otherwise than in such original package or container."

Every distributor is required to register with the State Board of Equalization (Sec. 2), and every distributor is required (Sec. 3), to

"pay a license tax to the State Controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock in hand or held in storage by him on September 30, 1923."

From the amount found due to the state from the distributor he is allowed to deduct one per cent of the tax "to cover subsequent losses occasioned by evaporation and handling" (Sec. 3). The tax is made a lien upon all of the property of the distributor and attaches at the time of the delivery or dis-

tribution. Within twenty days after the end of each quarter the distributor must report his deliveries or distributions for the quarter; the State Board of Equalization must make up a license tax roll within thirty days from the end of the quarter; the tax shall be paid within thirty-five days after the end of the quarter and if not paid prior thereto becomes delinquent on the forty-fifth day after the end of the quarter and a ten per cent penalty is added for delinquency (Secs. 4 and 6).

If a distributor uses motor vehicle fuel for a nonpublic highway use or for a nonmotor vehicle use he is entitled either to a credit or to a refund to the extent that his license tax was measured by that gallonage. The nonpublic highway and nonmotor vehicle uses are defined in sections 10 and 11.

Anyone who can show that he has bought and used motor vehicle fuel for a nonpublic highway or for a nonmotor vehicle use and who can also show that he has paid any license tax for such fuel, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed the amount of such tax paid by him. This is the so-called refund provision.

Our state courts have not held that said taxes are taxes upon the motor vehicle operator and not upon the person or company engaged as a distributor in the business of manufacturing or selling motor vehicle fuel to be used in propelling motor vehicles upon

the public highways. No occasion has arisen in a state court for a determination of the nature of those taxes.

Nevertheless, appellants insist that the supreme court of California has interpreted the act of 1923 as imposing a license tax for motor vehicles operated over the public highways. They wholly rely, in that regard, upon the case of

Old Homestead Bakery vs. *Marsh*, 75 Cal. App. 247.

That case did not present any issue before this court, nor was the court faced with the problem of determining whether the tax was an occupational excise for the privilege of conducting the business specified in the act of 1923, or whether it was a tax upon the operators of motor vehicles upon the public highways.

The only question there before the court was whether the state law offended against the equal protection clause of the Fourteenth Amendment and against a similar provision in the state constitution in discriminating between electrically-propelled and gasoline-propelled vehicles operating upon the public highways in the matter of the burden of state licenses and taxes. The difference in treatment complained of was justified by the court as reasonable in view of the essential distinction in the types of vehicles (p. 263).

Incidentally, the court stated that the act of 1923 was one

> "requiring, practically, the owners or operators of all such cars (gasoline propelled cars) to pay to the state, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof. It is true that the license tax of two cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles, yet, that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of two cents on every gallon of gas that they purchase for use in propelling motor vehicles, is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so called 'overhead expenses,' and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer * * *."

That may be said of anyone who has anything to sell and has, therefore, opportunity to pass on his taxes to the buyer, but is far from a declaration that the gasoline tax is a "toll" upon users of the highways.

Indeed, there have been several cases before our state courts upon records disclosing that the two-

cent tax was passed on to the consumer, but in no one of those cases did the court have occasion to determine whether the tax is upon the consumer instead of upon the privilege of conducting the business of selling the thing which the consumer uses.

People vs. *Ventura Refining Co.*, 75 C. D. 759;
People vs. *Richfield Oil Co.*, 75 C. D. 766;
People vs. *Richfield Oil Co.*, 76 C. D. 45.

The only other state appellate court cases in which the statute was involved are

People vs. *General Petroleum Corp.*, 75 C. D. 567, and
People vs. *Sterling Refining Co.*, 54 C. A. D. 777. 261 Pac. 1080.

but they do not bear upon the point now under discussion.

The term "highways" used in the act of 1923 comprehends *all* public highways in the state, including many highways upon which federal aid moneys have not been or can not be expended.

The text of the act of 1923 clearly shows an intention on the part of the legislature to license the business of "distributor." No one but the distributor is required by the act to pay the tax. The state has no control over the distributor after he has paid the tax and if he attempts to or succeeds, in whole or in part, in passing on the tax to someone else, surely it can not fairly be said that the state has taxed the person to whom the tax has been passed on by the distribu-

tor. The only one whom the state makes responsible for the tax is the distributor. The tax is imposed upon him alone, and there is no word in the statute indicating that the state stands behind the distributor in any effort to pass on the tax to the consumer. Unless the state participates in the act of passing on the tax there is no indirect taxation of the consumer by the state.

The tax in question is no more a "toll" than would be an ordinary property tax assessed and levied against an automobile in the hands of the dealer, assuming, as is doubtless the fact, that the amount of the tax is, in effect, passed on to the buyer who uses the automobile over the public highways.

There is no provision in the California constitution denying to the state legislature the power to regulate the business of selling fuel to be used in propelling motor vehicles over the state highways or the power to tax the privilege of carrying on that business. Therefore that power exists.

Pierce Oil Corporation vs. *Hopkins,* 44 S. Ct. 251;

Panhandle Oil Co. vs. *Mississippi,* 48 S. Ct. 451.

There is no vested right to an unrestricted or unregulated use of the public highways. They belong to the state, all will concede; the state may make provision appropriate for securing the safety and convenience of the public in the use of them, and in so doing

"it may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided."

Buck vs. *Kuykendall,* 45 S. Ct. 324 (325);
Kane vs. *New Jersey,* 244 U. S. 160;
Hendrick vs. *Maryland,* 235 U. S 610;
Michigan Public Utilities Commission vs. *Duke,* 45 S. Ct. 191.

A similar New Mexico statute applicable to distributors of gasoline has been held by this court to be an excise tax.

Bowman vs. *Continental Oil Co.,* 256 U. S. 642;
Askren vs. *Continental Oil Co.,* 252 U. S. 444.

On February 18, 1929, this court, in the case of

Hart Refineries vs. *W. E. Harmon,* as Treasurer of the State of Montana, No. 210, October Term, 1928,

declared a Montana statute, similar in terms to the California act of 1923, to levy an excise tax upon distributors and dealers engaged within the state of Montana in the business of refining, manufacturing, producing or compounding gasoline or distillate and selling the same in that state, and also upon those engaged within that state in the business of shipping, transporting or importing gasoline or distillate into that state and selling it there after it has been brought to rest therein.

An Illinois gas tax statute, similar to the Cali-

fornia act except in the matter of the refund provision, has been held to be an occupational tax imposed upon distributors of motor vehicle fuel and a charge on the business of distributing motor vehicle fuel imposed for the purpose of raising revenue for highway construction and maintenance.

Chicago Motor Club vs. *Kinney,* 160 N. E. 163.

An Arkansas statute required all sellers of gasoline for use in motor vehicles to collect a tax of one cent a gallon in addition to the usual charge and pay it over to the county treasurer. The federal court held that the tax was not levied against the purchaser, but was an excise tax on the privilege of making sales of gasoline, even though, as the court said, it is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodity sold which will include the amount of the tax.

Pierce Oil Corporation vs. *Hopkins,* 282 Fed. 253 (255),

citing

Clark vs. *Titusville,* 184 U. S. 329.

On the appeal to this court the Arkansas statute was upheld.

Pierce Oil Corporation vs. *Hopkins, supra.*

A statute similar to the California act of 1923 was enacted by the legislature of Mississippi. It was held by the Supreme Court of that state to be a tax

upon the privilege of engaging in the business of distributing motor vehicle fuel.

State of Mississippi vs. *Panhandle Oil Co.* 147 Miss. 663.

In many other states there is legislation along the lines of the California statute and on every occasion it has found its way into the state courts, it has been pronounced to be a privilege or occupational tax.

Foster & Creighton Co. vs. *Graham* (Tenn.), 285 S. W. 570;
Altitude Oil Co. vs. *People* (Colo.), 202 Pac. 180;
Amos vs. *Gunn* (Fla.), 94 So. 615;
Gafill vs. *Bracken* (Ind.), 145 N. E. 312;
Viquesney vs. *Kansas City* (Mo.), 266 S. W. 700;
Carson City vs. *Red Arrow Garage* (Nev.), 225 Pac. 487;
Portland vs. *Kozer* (Ore.), 217 Pac. 833;
Standard Oil Co. vs. *Jones* (S. D.), 205 N. W. 72;
Grayburg Oil Co. vs. *State* (Tex.), 286 S. W. 489;
State vs. *Hart* (Wash.), 217 Pac. 45;
State vs. *Liberty Oil Co.* (Ind.), 97 So. 438;
Hart Refineries vs. *Harmon* (Mont.), 263 Pac. 687.

An extensive annotation in this regard appears in 47 A. L. R. 980.

The Federal Aid Act and the Federal Highway Act Have Not Been Violated.

The prohibition in the Federal Aid Act of 1916 and in the Federal Highway Act of 1921 against the expenditure of federal moneys in constructing or reconstructing roads which are not free from tolls does not extend to occupational or privilege taxes.

Appellants do not cite a single case which holds, or even intimates, that a state law such as the California Motor Vehicle Fuel License Act of 1923 or 1927 imposes a "toll" contrary to the prohibition in the Federal Aid and Highway Acts.

Every decided case involving this point has sustained state excise taxes against the claim that they run counter to the anti-toll provision, but no one of them is cited in appellants' brief. The first of them is

Cunningham vs. *Potts,* 9 Fed. (2d) 469.

It deals with a statute of the state of Washington providing for a liquid fuel tax on gasoline used in vehicles operated or intended to be operated on public highways of that state. The act was attacked by owners and operators of motor vehicles, represented by counsel for appellants in this proceeding, on the ground it imposed a "toll" forbidden by the federal aid laws, but the court upheld the state law saying:

> "If a tax of two cents a gallon, paid by the seller or distributor of gasoline used in vehicles operated or intended to be operated upon the public highways of the state, is in any sense a toll charged for the use of such public highways, it is not forbidden by section 9, because there are pub-

lic highways of the state for the privilege of using which, by motor vehicles, the state has the undoubted right to exact such tax. If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal aid highways, a different question would be presented."

A direct appeal was taken to this court and was dismissed for want of jurisdiction.

47 S. Ct. 334.

While the Washington statute was under attack in *Cunningham* vs. *Potts, supra,* certain owners and operators of motor vehicles within the state of Oregon, also represented by counsel for appellants in this proceeding, sought to enjoin the collection of taxes under an Oregon statute imposing a license tax on dealers selling fuel for motor vehicles traversing the public highways in that state. They contended that the statute violated the anti-toll provision of the federal road acts, but the court refused an injunction and sustained a motion to dismiss. From that decree a direct appeal was taken to this court and was dismissed for want of jurisdiction.

Anthony vs. *Kozer,* 11 Fed. (2d) 641, 47 S. Ct. 334.

In holding that the license tax was not a "toll" within the contemplation of the federal statutes the court said that the use of the revenue for highway

purposes did not lend any support to the argument that the tax was a toll upon the use of the highways by automobile traffic because

> "The state could as well have directed that the money arising from such tax should be turned into the treasury generally, and used for general purposes. If such had been the case, there could not be the remotest inference that the tax was a toll imposed upon the privilege of using the highway for automobile traffic."

Answering the argument that the purchaser of fuel from the dealer was required to pay, as an added expense, the exact amount of the tax, the court said:

> "Nor is it demonstrable that the tax that the dealer is required to pay is an added expense to the purchaser, for his motor fuel, in the exact amount of the tax. It may or may not be, with the probability in favor of the negative. No one can say that the levy of the dealer's excise tax lifts the market price of motor fuel by just that amount, or in any amount, if it comes to that. It may be that the market price of the fuel is controlled by the importers into the state. But that, again, is controlled by competition among oil producers and refiners, and by supply and demand. Of course, local conditions enter more or less into the fixing of market value, one of which may be the imposition of a local excise tax, and it may be that importers, in responding to market prices, really absorb a proportion of the tax; that is to say, the market price to the dealers may be less by reason of the tax than it would otherwise be. So that it can not be said with confidence that

motor oil costs the users more by exactly the amount of the tax than it would cost them if the tax were not imposed, nor that the user pays more by the amount of the excise paid by the dealer for his motor fuel. The amount of the tax is therefore an unreliable standard as a toll against the driver of an automobile for the privilege of operating his car upon the highways."

Analyzing the intention of congress, in its reference to "tolls" in the road acts, the court said

"Further than this, the tax lacks the characteristics of a toll. In its general acceptation, toll is 'a settled, certain, and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; the consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359.

"No doubt the congress had in mind, in adopting the clause, 'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage, the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over

the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of congress in extending aid to the states for construction and maintenance of their roads and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of congress, and is therefore not to be condemned as such."

At the same time the Oregon license tax was in question in *Anthony* vs. *Kozer, supra,* a group of owners and operators of motor vehicles, represented by counsel for appellants in this proceeding, assailed the Motor Vehicle Act of Oregon upon the same ground, but the state's motion to dismiss was granted.

Martine vs. *Kozer,* 11 Fed. (2d) 645.

The federal court referred to *Anthony* vs. *Kozer, supra,* as "an analagous case" and quoted approvingly what was there said with reference to the anti-toll provision, concluding with the statement that the taxes under the Motor Vehicle Act were

"not a toll of any kind within the intendment of the acts of congress cited * * *."

The state of Idaho has a statute imposing a weight tax upon transportation companies using the public highways for compensation. It was urged in the state court that the tax was in violation of the provisions in the federal road acts forbidding tolls, but the state court held that the tax was consistent with

those provisions because it was a license tax laid not upon the vehicle but upon the privilege of using the highways for business purposes.

Smallwood vs. *Jeter,* 244 Pas. 149.

The Idaho statute, the subject of controversy in *Smallwood* vs. *Jeter, supra,* was taken before the federal court in an injunction suit in the case of

Sanger vs. *Lukens,* 24 Fed. (2d) 226.

One of the questions, in the language of the court, was whether the declarations in the acts of congress authorizing the cooperative work on public highways against the exaction of tolls "deprived the state of the power of enforcing regulations in the use thereof." The motion to dismiss was sustained, the court adopting the view expressed in the Anthony, Martine and Smallwood cases.

An act of the state of Michigan imposing privilege taxes upon common carriers of persons and property by motor vehicles on the public highways was alleged to be contrary to the anti-toll provision in the Federal Highway Act of 1921 in the case of

Liberty Highway Co. vs. *Michigan Public Utilities Commission,* 294 Fed. 703 (708),

but the court ruled otherwise, saying of that provision:

> "This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analagous fees imposed under general motor

vehicle license laws, or to laws licensing drivers of such vehicles). *State* vs. *Vigneaux,* 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the federal government and the state, to the contribution of aid provided by federal legislation, and can not deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

The Motor Vehicle Act of Minnesota was asserted to be invalid to the extent that it applied to vehicles using federal aid highways, because of the anti-toll provision. The point seems to have been predicated upon the decisions of this court in *Buck* vs. *Kuykendall* and *Michigan Public Utilities Commission* vs. *Duke, supra,* but of them the state court said:

> "We find nothing in these cases which would prevent a state from enacting a statute imposing a reasonable tax upon motor vehicles using public highways constructed with federal aid."
>
> *State* vs. *Oligney,* 202 N. W. 893, (896).

An Oregon statute regulating the use of the highways by motor trucks of over five tons capacity was before this court to have determined whether it was contrary to the letter and spirit of the Federal Highway Act.

Morris vs. *Duby,* 47 S. Ct. 548.

Referring to that act of congress this court held that it disclosed no provision, express or implied, by which there was withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. It was also said:

> "Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on the state."

Although all of the cases cited under this head sustain the right of a state to enact and enforce so-called gasoline taxes consistently with the federal aid acts, only one of them, *Anthony* vs. *Kozer, supra,* undertakes an analysis of what congress intended in declaring that highways receiving federal aid shall be free of tolls. In that case the court reasons that the term "toll", in its general acceptation, is a definite sum exacted for the use of a common passage.

The tax imposed by the California statutes is not a definite sum exacted for the use of a common passage. It is not a direct charge upon those who use the common highways of the state, and if distributors

of motor vehicle fuel do succeed in passing on the tax to those who use the roads, those thus affected are only operators of motor vehicles. Even they may use the common highways of the state without any indirect burden if they choose to traverse the highways otherwise than by motor vehicle.

A "toll" in the true sense would be a charge to all who travel over a highway, regardless of the means by which they proceed. In writing into the federal law the prohibition against tolls, congress apparently did so in contemplation of charges exacted for the privilege of passing over the privately owned roads used by the public and subsidized roads of quasi-public character. Those who insist upon traversing the common highways in a particular manner, namely, by motor vehicle, are essentially in the same category as those who earn their livelihood by using the common highways in carrying on their business. There being no vested right to an unrestricted use of public highways, and power existing in the states to impose direct taxes upon everyone using the highways regardless of the purpose or character of use, particularly upon those who employ an instrumentality highly destructive to the road bed and a source of danger to others, it would seem to follow that congress recognized the existence of that power and has not attempted to deny its exercise in the federal aid legislation.

Suggestive that the intention of congress is as federal and state courts have declared it, is the

amendment made by congress in 1927 to the Federal Highway Act of 1921,

C. 370, 44 Stat. 1398, reading as follows:

"Notwithstanding any provision of this title, the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any toll bridge, federal aid under such title, in the construction of any toll bridge and approaches thereto, by any state or states, or political subdivision or subdivisions thereof, upon the condition that such bridge is owned and operated by such state or states, or political subdivision or subdivisions thereof, and that all tolls received from the operation thereof, less the actual cost of operation and maintenance, are applied to the repayment to the state or states, or political subdivision or subdivisions thereof, of its or their part of the cost of construction of such bridge, and upon the further condition that when the amount contributed by such state or states, or political subdivision or subdivisions thereof, in the construction of such bridge shall have been repaid from the tolls, the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a free bridge."

Assuming, for the moment, that the taxes in question are "tolls" within the prohibition of the federal statutes, no question of constitutionality is presented. At most, there would be, in such event, a breach of contract on the part of the state and a mistake on the part of the federal government. Not even under

those circumstances would appellants be entitled to have state officials enjoined from collecting and expending the taxes collected under the state law, and appellants do not put forward any decision or reasoning of contrary persuasion.

The Federal Government Has Acquiesced in the Action of California and Other States.

The federal government has not attempted to carry out a policy of independent construction and maintenance of public highways needed for national purposes, and much might be said against such a course. Presumably, congress has always been fully conscious of its obligation to provide, or cause to be provided, public roads for the transportation of the mails, troops and munitions of war and for the facilitation of interstate commerce.

Since 1923 the state has been enforcing the two-cent tax act without any complaint on the part of the federal government, and during the five-year period congress has been, and still is, according to the allegations of the complaint, appropriating large sums to the state under the authorization of the federal aid acts.

When the Federal Aid Act was passed in 1916 the Motor Vehicle Act of 1915, which followed substantially the Motor Vehicle Act of 1913, was in operation in California, and under those statutes registration fees and licenses were imposed upon motor vehicles using the public highways. The

Motor Vehicle Ast has been held by the Supreme Court of California to impose an excise or privilege tax for the purpose of providing a fund for roads under the dominion of the state authorities in the nature of compensation for damage done to the roads by motor vehicles.

In the Matter of Schuler, 167 Cal. 252;
In the Matter of Stork, 167 Cal. 294.

Ever since 1913 there has been in force in this state a Motor Vehicle Act, and no complaint has ever been made by the federal government that the charges thereby *directly* imposed for the operation of motor vehicles over the public highways constitute a violation of the anti-toll provision of the federal acts.

From 1923 to 1928 there was in full force in this state a Motor Vehicle Transportation License Act requiring operators for hire upon the public highways to pay a license fee to the state, but the federal government has never asserted that the imposition was contrary to the acts of congress.

Since the first Monday in March, 1927, the property tax imposed by section 15, article XIII of the constitution of California upon certain common carriers engaged in business over the public highways has been in force, but notwithstanding that law, and all of the others to which reference has been made, federal aid moneys have been paid to the state.

Under section 11, article XI of the constitution of California, any county, city or town may make and enforce within its limits all such local regulations as

are not in conflict with general laws, and under that authorization local licensing ordinances have been adopted applicable to those who use the highways for profit.

Inaction on the part of the federal government presumes acquiescence in what the State of California, and other states, have been and are doing in the matter of taxation, so far as the federal aid highways are concerned, and may fairly be attributed to a recognition of the fact that the states must find moneys with which to construct and maintain highways receiving federal aid, to construct highways which will receive no federal aid, to maintain all of the public highways, including those into which federal moneys have been placed, and that, in doing so, the state may justly take into consideration those types of vehicles which cause the highways the greatest wear and damage and those persons and companies who operate vehicles over the highways for their personal gain.

Surely the federal government did not contemplate the expenditure of millions of dollars from the national treasury for the construction and reconstruction of state roads which would deteriorate into disuse or nonusability, thus defeating congress in accomplishing various national purposes, if the states were cut off, as appellants contend they are, from the right to enact reasonable measures for the production of revenue with which those highways may be maintained and extended.

Appellants Have No Standing in Court.

Again assuming the soundness of appellants' primary contention that the tax in question constitutes a toll of the kind prohibited by the federal acts, appellants have failed to demonstrate how *they* are entitled to be heard in that connection.

The federal acts find their authority in section 8, article I of the federal constitution, by which the states have delegated to congress power to "establish post offices and post roads," and power to make all laws necessary and proper to carry that power into effect. No one of the several claimants is a party to the alleged contract between the federal government and the state. If that contract has been breached by the state, the federal government alone may complain. The alleged breach of contract by the state of itself presents no question of unconstitutionality.

Appellants have cited a number of cases (p. 32 to 41) where states breached definite contracts with the federal government for the transportation of troops, and mail and other government property. In those instances, of course, relief was extended to the federal government, but none of those cases lends support to the position assumed here by the appellants.

It is alleged that the appellants are taxpayers and that they own personal and real property in this state, but it does not appear how that allegation has any significance or how it establishes an interest on

their part sufficient to entitle them to the relief sought.

They claim that they are operators of motor vehicles over the public highways of this state, that they have paid the gasoline taxes, and that they will continue to pay, unless the appellee is restrained, taxes under the acts of 1923 and 1927. The amount which they have thus paid is not alleged, nor is it alleged that the state will be unable to reimburse them from its general fund if the appellee is permitted to continue apportioning the revenue derived from the 1923 and 1927 acts pursuant to the terms of those statutes.

The State Law Is Consistent With the Fourteenth Amendment

The claim that the fourteenth amendment is offended by the California Statutes has often been made against similar laws of other states, but has not been regarded seriously by the courts. Uniformly it has been held that they meet the test of the fourteenth amendment.

Hart Refineries vs. *Harmon, supra;*
Pierce Oil Corp. vs. *Hopkins, supra;*
Bowman vs. *Continental Oil Co., supra;*
Cunningham vs. *Potts, supra;*
Sanger vs. *Lukens, supra;*
Standard Oil Co. vs. *Brodie,* 239 S. W. 753.

The State Law Is Consistent With the State Constitution.

In view of the overwhelming array of authority against appellants' contention that this proceeding

involves federal questions, there seems justification for appellee to reply that merely colorable and not substantial federal questions are raised, and that no duty arises to consider the state questions.

Silver vs. *Louisville etc. Co.*, 213 U. S. 175.

1. The Refund Provision.

Five points are made under the California constitution. First it is claimed that the refund provision (Sec. 11) violates the inhibition against gifts of public moneys.

In the case of *Chicago Motor Club* vs. *Kinney, supra,* it was held that the refund provision in the Illinois gas tax statute violates the prohibition of the Illinois constitution against a gift of public moneys because the refund was made available to a person other than the distributor without regard to whether that person had directly or indirectly paid the tax. The Illinois court expressly refers to the California law and distinguishes the latter by reason of the fact that no refund is permitted under the California law unless the applicant can show that he has directly or indirectly paid the tax.

The refund provision in section 11 of the California statute in express terms requires such a showing by the applicant. That, of course, is merely a recognition by the state that a distributor may under certain circumstances pass on the tax to the consumer, but it certainly is not a direction, or even a suggestion, that he do so. The consumer has in fact

had the tax passed on to him and he can clearly show to the satisfaction of the state that such is the case *and also* that the fuel which he purchased was employed in a nonpublic highway or in a nonmotor vehicle use, then he is entitled to a refund, for under those circumstances it would be his money and not the distributor's money that would have been paid to the state.

The state wisely puts the burden on the distributor to pay a tax measured by the amount of all fuel sold and delivered by him and it collects the tax conditionally, with the right outstanding in the distributor or in the consumer, as the case may be, to show, if he can, that gallonage considered in the computation of the state tax has been used otherwise than in propelling motor vehicles over the public highways of the state.

The California constitution prohibits a gift of public moneys, but it does not prohibit the collection of moneys and their placement in a special fund subject to the condition that the whole or a portion thereof may be paid out by a showing such as that specified in section 11 of the act of 1923. The Illinois case is the only authority cited by appellants in support of their claim that the refund provision violates the gift prohibition.

This point has not been raised in or decided by the California courts.

2. The One Per Cent Provision.

The provision in section 3 of the act of 1923 permitting the distributor to deduct from the tax computed by the State Board of Equalization, one per cent thereof "to cover subsequent losses occasioned by evaporation and handling" is claimed to be unconstitutional, but no argument is advanced in support of the claim.

By analogy, the California statute is an occupational or privilege tax and not a tax upon the user of the highways. The state reaches out for the money of the distributor and it is his money which the state takes. The state requires the distributor to pay a tax measured by his sales of motor vehicle fuel, less one per cent of the amount so computed which is intended as an allowance for losses occasioned by evaporation and handling.

It was within the legislative discretion to have charged a less amount in the first instance, or to permit a deduction, as it has done, on account of such losses occurring subsequent to the filing of the distributor's report with the state. In other words, the amount of the obligation of the distributor to the state is not established until the deduction is made and the obligation of the distributor does not attach until the final computation.

The situation in this regard is much the same as that presented in the Motor Vehicle Transportation License Acts of 1923 and 1925, above referred to, wherein the operator was entitled, as an element in

the process of computing the state tax, to a credit or off-set for the aggregate amount of taxes paid to subordinate governmental agencies of the state. This point has not been made or determined in any state court.

3. The Forty-five Day Provision.

It is also asserted that the provision in the statute permitting the distributor to withhold the amount of the tax for forty-five days after the expiration of the quarterly period is unconstitutional, but again no argument or authority is cited in support of the assertion. The obvious answer to this point is that it is within the discretion of the state to prescribe when a tax is payable and when the delinquency penalty shall attach. A state may permit the distributor to withhold payment of the tax for any period prescribed by the state, if it is the distributor's money that is being paid, or it may make the distributor, as is done under the Arkansas statute, a collector of a tax which is passed on to and paid by the consumer. The California statute imposes a tax upon the distributor and it is his money that the state requires to be paid in as soon as the tax roll for each quarter has been made up and a reasonable time allowed the distributor to pay.

It is quite generally argued that a public utility passes on its taxes to its consumers, but if that is a fact it is not the consumer's money that the state requires to be paid when the tax is levied directly

upon the utility or upon its property. Under section 14, article XIII of the constitution of California the state tax imposed on certain utilities becomes due on the first Monday in July of each year, but the utility is given about six weeks within which to pay without suffering a delinquency penalty, and further it is allowed to pay the tax in two installments, and to delay the payment of the second installment until February following the due date. That is purely a matter of legislative discretion.

4. The Provisions of the State Law Under Attack Are Separable.

Assuming the invalidity of all of the questioned provisions of the state law, each and all of them is separable and may be eliminated from the statute without nullifying the law in its entirety.

It can not be said that any one is inseparably related to the remainder of the act or so indispensable as to render the remainder of the act inoperative. The intention of the legislature that the remainder of the statute be given operation should any provision be unconstitutional but separable is expressed in section 15 of the act.

The last word of the Supreme Court of California on the rule of severability was uttered in cases which found their way to this court, and it is plain therefrom that the state law will stand in the event that the refund provision, or the one per cent provision or the forty-five day provision, is adjudged invalid.

5. The Title of the State Laws Is Sufficient.

Section 24, article IV of the constitution of California requires that the subject of an act be expressed in its title. Twice the act of 1923 here under consideration has been attacked on the ground that its title was defective but in each instance the court held that the subject of the act is fairly expressed in the title, that the title is not such as will mislead or deceive, and that no more is required in a title than a fair summary of the contents of the act.

People vs. *General Petroleum Corp., supra;*
People vs. *Sterling Refining Co., supra.*

6. The Distribution of the Revenue Under the State Law.

It is alleged that no portion of the revenue derived under the act of 1923 or under the act of 1927 is paid over to the municipalities of the state, but neither in the complaint nor in appellants' brief is any reason suggested or authority cited to the effect that the state is without power to legally so provide.

The disposition of the revenue under those statutes is entirely a matter of legislative discretion. It was not necessary that any portion of the revenue be apportioned to the county. The state could have retained the entire revenue and could have devoted it to state highways exclusively. The state was under no legal compulsion to give one cent of that revenue to the county or to the municipality, but as a matter of equity and policy the legislature has prescribed that one-half of the revenue shall be turned over to

the counties to be expended by them in the construction and maintenance of "roads, bridges and culverts" in each county, which manifestly authorizes the expenditure of that revenue upon city streets. That is the situation under the act of 1923.

All moneys received under the act of 1927 pass into the State Highway Construction Fund. The constitution of California does not direct the legislature to apportion any part of such revenue directly to municipalities, hence there is no legal objection to the course which the legislature has taken with respect to either the 1923 or the 1927 act.

In a pending proceeding entitled

> *Carley & Hamilton, Inc.,* vs. *Frank G. Snook,* Chief of Division of Motor Vehicles, No. 2274-L, In Equity, in the District Court of the United States for the Northern District of California, Southern Division, (Not yet reported).

an attack was made upon section 77 of the California Vehicle Act, which is also the subject of controversy in the case of *Bekins Van Lines, Inc., et al.* vs. *Ray L. Riley,* as Controller of the State of California, No. 530 on the October, 1928, term of this court, on the ground that the weight fees collected by the state under that section were not directly apportioned to municipalities. The plaintiffs therein were represented by counsel in this proceeding and the court, consisting of Circuit Judge Rudkin and District Judges St. Sure and Louderback, in denying an

interlocutory injunction and granting the state's motion to dismiss, said in that regard:

> "The plaintiffs challenge the validity of those portions of the act imposing a tax or registration fee on the vehicles owned and operated by them within the corporate limits of the several municipalities of the state on the ground that the fee is in the nature of a toll for the use of the highways, and inasmuch as the plaintiffs make no use of the highways outside of the municipalities and are taxed for such use by the municipalities, the exaction by the state violates the Fourteenth Amendment to the Constitution of the United States. This broad contention cannot be sustained. In the lawful exercise of its acknowledged police power, the states may, beyond question, exact registration fees from owners and users of motor vehicles, varying with their horse power or weight, regardless of the extent or place of use, so long as the vehicles are or may be used on the public highways of the State." (Citing *Hendrick* vs. *Maryland,* 235 U. S. 610-22 and *Kane* vs. *New Jersey,* 242 U. S. 160-7.)

Injunction Relief Should Be Denied.

If the appellee should be enjoined from apportioning any money which it may now have and future collections under the acts of 1923 and 1927, all state highway construction and maintenance work will terminate abruptly, and the counties will be able to make no substantial progress in the construction and maintenance of public highways within the counties.

Millions of dollars of revenue, as appellants correctly allege, are in the balance so far as California's public highway program is concerned. The amount of money in which the appellants are interested as persons, who, it is claimed, have paid taxes, is not disclosed by the complaint. Of course it is inconsequential compared with the aggregate revenue derived by the state through the taxes imposed on distributors of motor vehicle fuel. Whatever may be the amount for which appellants claim reimbursement at the hands of the state, it is not alleged by them that the state will be unable to reimburse them, if that becomes necessary, out of moneys belonging to the state other than those represented by the proceeds of the 1923 and 1927 acts. Failure to make the allegation renders meaningless their assertion that they will suffer irreparable injury if the injunction prayed for be not granted.

It must be conceded that all of the public highways in the state are not and can not be federal aid highways, yet there is no allegation in the complaint attempting to segregate, even in a general way, those highways upon which no federal aid moneys have been or can be expended. It is plain that the taxing features of the acts of 1923 and 1927 will stand even though any one or all of the provisions of the statute attacked by the appellants be void, for they are separable provisions. It is equally plain that even though those acts be found contrary to the federal highway acts, they are valid and enforceable so far

as the public highways receiving no federal aid are concerned. That those acts do not contravene the fourteenth amendment of the federal constitution is definitely established. Therefore, the inability to allege that all of the public highways in the state are federal aid highways is a fatal omission so far as appellants' demand for an interlocutory injunction is concerned.

Appellants complain that appellee continues to pay out refunds, and it is asked that he be restrained from so doing. It has not been alleged by appellants that *they* have paid to the state any part of the moneys which it is alleged are being refunded by the state, or that they qualify for refunds under the terms of the state law. Refunds are payable under the terms of the state law only to those persons who have in fact paid the state tax *and* who have *not* used the motor vehicle fuel in propelling motor vehicles over the public highways of this state.

If the state laws are valid, tested by the state and federal constitutions, but are contrary to the terms of the federal acts, the remedy would seem to be to enjoin the payment of federal aid moneys to the state, but not to paralyze an extensive system of public highway construction and maintenance inaugurated long before federal aid was made available, comprehending a great number of highways which never have received and never will be able to receive federal aid, and which are quite as important to the federal government as to the State of California.

Wherefore, we submit that the decree of the court below denying injunctive relief and sustaining the motion to dismiss should be affirmed.

Respectfully.

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APPENDIX

MOTOR VEHICLE FUEL TAX LAWS.
TWO-CENT TAX ACT.

CHAPTER 267, STATUTES 1923.

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes of two cents on the distribution of each gallon of such fuel.

[As amended by chapter 359, Statutes 1925, and chapter 716, Statutes 1927. There is an additional tax of one cent on the distribution of each gallon of such fuel, imposed by chapter 795, Statutes of 1927, *infra*.]

Definitions.

SECTION 1. The following words, terms and phrases shall whenever used in this act, have the meaning set forth in this section.

(*a*) "Motor vehicle" shall include every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(*b*) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naphtha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(*c*) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who

imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(*d*) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles.

Distributor's License.

SEC. 2. Every distributor shall within ten days after this act becomes effective and thereafter any person, firm, association or corporation before becoming a distributor shall register as such with the state board of equalization on forms to be prescribed, prepared and furnished by said board of equalization, and said state board of equalization shall issue to such distributor a license which shall be valid until revoked by said board as hereinafter provided.

Tax on Distributor.

SEC. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and

sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

Tax, Lien of, When Due, and Penalty.

SEC. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license

tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p.m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency.

Distributor's Record.

SEC. 5. Every distributor shall keep a record in such form as the state board of equalization shall require, showing the total number of gallons of motor vehicle fuel refined, manufactured, produced or compounded in this state and sold by such distributor within this state during each quarter; showing the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed by such distributor in this state during each quarter, whether in the original package or container in which the same was imported or otherwise than in such original package or container and the total number of gallons of such fuel acquired by such distributor in the original packages or containers in which the same was imported into this state and thereafter sold, distributed or used by him.

Distributor's Report. Tax Roll.

SEC. 6. Each distributor shall, within twenty days after the quarter ending December thirty-first, one thousand nine hundred twenty-three, and within twenty days after the end of each following quarter, file on forms to be prescribed, prepared and furnished by the state board of equalization, a verified statement showing the total number of gallons of motor vehicle fuel refined, manufactured or com-

pounded by such distributor within this state, and sold during such quarter by such distributor within this state; the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed within this state by such distributor during such quarter, when sold or distributed otherwise than in the original packages or containers in which imported into this state or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this state and thereafter sold, distributed or used by him; and such other information as the state board of equalization may require. The state board of equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax roll prepared and kept for the purpose, and on or before thirty days from and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due.

What Constitutes Taxable Sale.

SEC. 7. All motor vehicle fuel distributed by any distributor to any of its service stations, or other agencies, tank trucks, wagons, boats, barges, or other facilities operated by such distributor in this state shall for the purposes of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold and delivered by such distributor; *provided,* that the amount of motor vehicle fuel distributed during any quarter to any such agency, tank truck, wagon, boat, barge, or other facility operated

by the distributor is hereby defined to mean the amount thereof thereafter found to have been sold and delivered therefrom during such quarter plus one-ninety-ninth thereof but excluding therefrom deliveries to service stations operated by such distributor.

All motor vehicle fuel used by a distributor in the operation of any motor vehicle shall for all the purposes of this act be considered in same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold by such distributor; *provided, however,* that in lieu of the collection and refund of the tax upon such fuel used for exempt purposes a credit may be given such distributor upon his tax return and assessment.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel.

Penalties Regarding Reports.

SEC. 8. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular.

Arbitrary Assessments.

SEC. 9. If any distributor shall fail, neglect or refuse to file the reports herein provided, the state board of equalization, immediately after such time has expired, shall proceed to inform itself as best it may regarding the matters and things required to be set forth in such statement, and, from such information as it is able to obtain, shall make a statement

showing such matters and things and shall determine and fix the amount of the license tax due to the state from such distributor for such quarter, and shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the state controller who shall proceed to collect the amount of such license tax with the penalty added thereto, together with interest on the whole thereof at the rate of seven per cent per annum from the date upon which such statement should have been filed, and the distributor is thereafter estopped from complaining of the amount thereof.

Suits for Taxes.

Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued.

Nontaxable Sales.

SEC. 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports

and sales to the state board of equalization in such detail as that board may require.

Tax Refund on Certain Sales.

SEC. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him or it upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the

state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not be considered for any purpose by the state controller, the treasurer or the State of California.

Audit and Adjustment of Tax.

SEC. 12. The state board of equalization shall have the power and it is hereby authorized to make any and all such examinations of the records of distributors as it may deem necessary in carrying out the provisions of this act. If such examinations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors, pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power and is hereby authorized to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors as hereinbefore authorized. The cost if any of such examination to be payable from the regular appropriation for clerical assistance of said board.

Distribution of Tax Proceeds.

SEC. 13. All money received by the state controller in payment of license taxes under the provisions of this act shall be by him deposited in the state treasury and credited to the "motor vehicle fuel fund," which fund is hereby created. One-half of all moneys remaining in said "motor vehicle fuel

fund" after the refunds herein provided for have been paid shall be paid therefrom to the counties of the state as hereinafter provided in the proportion which the number of vehicles registered in each of said counties bears to the total number of such vehicles registered in the state as determined by the places of residence of the owners to whom the registration certificates for such vehicles have been issued by the state during the current year, and it is hereby made the duty of the motor vehicle department to furnish to the state controller a record of the number of such registrations by counties. All such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it exclusively in the construction and maintenance of roads, bridges and culverts in each such county. In the event that any county has not established such a road fund, its proportion of such fund shall be retained by the state until provision for such a road fund has been made, and it shall then be paid over to such county.

In the months of May and November of each year, the treasurer shall make a report to the state controller setting forth the gross amounts received and the net receipts remaining after the payment of the refunds herein provided for for the preceding six months, and thereupon the controller shall draw his warrant upon the "motor vehicle fuel fund" in favor of each county in the state for the amount to which each such county is entitled. The controller shall not draw such warrant in favor of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its

annual report to the state department of public works as hereinafter required.

Report of Supervisors.

The board of supervisors of each county shall make an annual report to the state department of public works not later than three months after the close of the county's fiscal year upon forms to be provided by such department, showing the amount of moneys received from the "motor vehicle fuel fund" during the preceding fiscal year and the disposition of said moneys, giving such details as to the disposition of said moneys as may be required by said department. Whenever such report shall not have been duly filed in the manner and form herein provided for at or before the time herein specified, the state controller shall not draw his warrant in favor of the treasurer of such county until said report has been filed.

Appropriation to Highway Maintenance Fund.

All moneys in the "motor vehicle fuel fund" other than those hereinbefore appropriated, are hereby appropriated to and shall by the state treasurer be paid into the "state highway maintenance fund," which fund is hereby created, and shall be used for the maintenance, repair, widening, resurfacing and reconstruction of the state highways, and for the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in state parks, subject to the approval of the official or officials charged by law with the management and control of such parks, such moneys to be drawn from the state highway maintenance fund for the purpose of such maintenance, repair, widening, resurfacing and

reconstruction upon warrants drawn by the state controller upon demands made by the state highway commission and allowed and audited by the state board of control.

Penalties.

SEC. 14. Any person, firm, association or corporation or any officer or agent thereof failing to pay the tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act.

Constitutionality.

SEC. 15. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Repeal of Conflicting Acts.

SEC. 16. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

In Effect, When.

SEC. 17. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the legislature as Senate Bill No. 743.

Procedure to Correct or Cancel Tax.

SEC. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code.

ONE-CENT TAX ACT.

CHAPTER 795, STATUTES 1927.

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes of one cent on the distribution of each gallon of such fuel.

Additional Tax on Distributor.

SECTION 1. In addition to the two cents license tax provided for in an act entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all

acts and parts of acts inconsistent herewith," approved May 30, 1923, as amended and approved May 23, 1925, and referred to herein as the "original act," every distributor, as defined in said "original act," shall pay a license tax to the state controller of this state of an additional one cent for each gallon of motor vehicle fuel, as defined in said "original act," said license tax to be computed, paid and collected in the same manner and at the same intervals of time as in said "original act" provided.

Refund of Tax. Appropriation for Highway Construction.

All moneys received by the state controller from payment of the additional license tax under the provisions of this act shall be by him deposited in the state treasury of this state and credited to the "Motor vehicle fuel fund" created in said "original act," and shall be subject to the payment of one-third of the refunds provided for in section eleven of said "original act" in the manner therein provided. After the payment of said proportion of said refunds, the balance of said moneys received hereunder shall be by the state controller credited to the "State highway construction fund," which fund is hereby created.

How Expended.

SEC. 2. All moneys so credited to said state highway construction fund shall be allocated and expended by the California highway commission of this state for the acquisition of rights of way for and the construction and improvement of state roads and highways in accordance with that certain act entitled, "An act to provide for the acquisition of rights of way for and the construction, maintenance

and improvement of state highways, classifying the highways in the state system and allocating and directing the expenditure of funds for the construction, maintenance and improvement of state highways," passed at the forty-seventh session of the Legislature or as subsequently amended, and in the event that said last mentioned act shall not be enacted into law at the forty-seventh session of the Legislature then and in that event the license tax of an additional one cent for each gallon of motor vehicle fuel imposed under this act shall cease and be inoperative. All money withdrawn from the state highway construction fund shall be upon warrants drawn by the state controller upon demands made by the said California highway commission and allowed and audited by the state board of control of this state.

Adoption of Provisions of Original Act.

SEC. 3. All provisions, penalties and requirements now contained in said "original act," not inconsistent herewith, are hereby adopted and made a part of this act, notwithstanding any repeal or amendment of said "original act," hereafter.

SECTION 2, ARTICLE XVI, CONSTITUTION OF CALIFORNIA.

Immediately upon the adoption of this section the state treasurer shall prepare forty thousand suitable bonds of the State of California in the demonination of one thousand dollars each, to be numbered from one to forty thousand, inclusive, to bear a date not later than thirty days after said adoption and to bear interest at the rate of four and one-half per cent per

annum from the date of said bonds, said interest to be payable on the third day of January and the third day of July of each and every year after the sale of said bonds, and said bonds to become due and payable in annual parcels of one thousand bonds, commencing July 3, 1926, and ending July 3, 1965.

The provisions of the act of the legislature approved May 20, 1915, known as the "state highways act of 1915," relative to the signing, countersigning, indorsing and sealing of the bonds therein provided for and the interest coupons thereon, the place and method of payment of principal and interest thereon, the procedure for initiating, advertising and holding sales thereof, and the performance by the several state boards and officers of their respective duties in connection therewith as therein stated, and all other provisions, terms and conditions in said last-named act relating to the bonds therein mentioned, so far as the same shall be pertinent, shall be applicable to the preparation, issuance and sale of the bonds herein provided for, as herein contemplated.

Funds corresponding to those provided for in said act are hereby created, and payments into and out of the same shall be made as in said act provided, said funds to be designated respectively, "third state highway fund," "third state highway interest and sinking fund," and "third state highway sinking fund"; and on the first day of July, 1926, and on the first day of July of each year thereafter, from the general fund to the "third state highway sinking fund," the required moneys as provided in section five of said act for the purposes therein stated but

as applicable only to the bonds herein provided for and the interest thereon.

The moneys in said "third state highway fund" shall be used by the state department of engineering for the acquisition of rights of way for and the acquisition, construction and improvement of uncompleted portions of the system of state highways prescribed by the act of the legislature approved May 22, 1909, known as the "state highways act," and the act of the legislature approved May 20, 1915, and known as the "state highways act of 1915," and certain extensions thereof described in said last-named act, and also for the acquisition of the rights of way for and the acquisition, construction and improvement of the following additional highways as state highways: Barstow to Needles; Oxnard to San Juan Capistrano; Barstow to Mojave; Santa Maria to Bakersfield; Skyline boulevard San Francisco to Santa Cruz; Rio Vista to Fairfield; Auburn to Verdi; Ukiah to Tahoe City; Crescent City to Oregon line; Santa Rose to Shellville; Big Pine to Oasis; Placerville to Sportsman's Hall; Feather river route Oroville to Quincy; General Grant National Park to Kings river canyon, Calistoga to Lower Lake; Mecca to Blythe; Rumsey to Lower Lake; Azusa to Pine Flats in San Gabriel canyon; La Canada via Arroyo Seco to Mount Wilson road; Lancaster to Bailey's; Bakersfield via Walker's pass to Freeman; McDonald's to the mouth of the Navarro river; Carmel to San Simeon; Klamath river state highway bridge to coast state highway; Susanville to Nevada state line; Pacheco pass road into Hollister; Visalia to Sequoia Park line; Deep creek easterly via Bear Valley dam to the county road at Metcalf Creek in the Angeles

national forest; Orland to Chico; Tiburon to Alto; and county line near Michigan Bar via Huot's ranch to Drytown. Said additional highways to be located on the most direct and practical routes; provided, however, that twenty million dollars of the moneys in said "third state highway fund," or so much of said twenty million dollars as shall be necessary, shall be used for the completion of all of the system of state highways contemplated and provided for in said "state highways act" and in said "state highways act of 1915," and the extensions thereof specified in said last-named act.

The cost of acquisition and construction of the several extensions described in said "state highways act of 1915" shall hereafter be entirely borne by the State of California, it being the intention hereof to relieve the several counties from any further cooperation as contemplated by said "state highways act of 1915," but nothing herein shall prevent any county from contributing towards the cost of said extensions or of any other state highways at its option to such extent as it may desire under the provisions of any existing laws.

All provisions of section eight of said "state highways act of 1915," and of any amendment thereof, and any provisions of said act or of any amendment thereof, relating to the selection of routes, character of construction of highways, manner of conducting work thereon, powers and duties of officers in connection therewith, adoption of public highways as state highways, payment of principal and interest on any bonds and appropriation of money for payment thereof, and the keeping of records and making of statements and reports, and all provisions of section

eight of the "state highways act," as amended May 19, 1915, and of section eight of the "state highways act of 1915," and of any amendment of either thereof, relating to the payment by counties of money for interest upon any bonds and the relief of counties from such payment, shall, so far as applicable, apply to the bonds herein authorized and all highways constructed hereunder.

All provisions of this section shall be self-executing and shall not require any legislative action in furtherance thereof, but this shall not prevent such legislative action; and all expenses that shall be incurred by the state treasurer in the preparation of bonds herein provided for and in the advertising and sale thereof and all expenses incurred by any officer in reference thereto shall be paid from the general fund of the state. Nothing in this constitution contained shall be a limitation upon the provisions of this section.

STATUTES OF CALIFORNIA, 1913, PAGE 461.

Section 1. The board of supervisors of any county may on a not less than four-fifths vote of such board or governing body, petition the state department of engineering, hereinafter in this act called department, upon forms prepared by said department, or under its direction to have any main public highway in the said county, or town improved and maintained under the provisions of this act. Such petition shall contain a detailed description of the highway petitioned to be improved, a statement as to whether or not the rights of way for the said highway have been secured by the public; a statement of the kind of construction work with which it is sought to have the

highway improved, and such other information and data as the department may prescribe.

Sec. 2. Upon receipt of such a petition the department shall give careful consideration to the matters contained therein, and may authorize the body filing the petition to file an amended or modified petition conforming to such regulations and conditions as in the discretion of the department may be deemed just and proper.

If said department determine that public necessity and convenience require that such highway should be laid out and be taken charge of by the state, it shall cause the engineer or surveyor of the county in which the road to be improved is located to make adequate surveys, plans, specifications and estimates thereof subject to the approval and acceptance of the department. Upon approval by the department, a copy of the petition, resolution or undertaking, plans, specifications and estimate shall be filed with the department and also in the office of the recorder of the county in which the highway is situated and thereafter it shall be a state highway, and shall be constructed and kept in good repair as the department shall direct, under the supervision of the engineer or surveyor of the said county, the expense for construction and repair of same to be proportioned and paid as hereafter provided. Such highways shall be known as state aid highways.

Sec. 3. The department shall not grant the prayer of any petition for the improvement of a highway under the provisions of this act unless all necessary bridges and culverts shall have first been constructed by the county, or town in which the highway is situated, in a manner satisfactory to the

department, nor unless all necessary rights of way have been secured by the public. All expenditures under the provisions of this act shall be distributed equitably throughout the state.

Sec. 4. When the department is prepared for construction it shall so notify the governing body of the town or county in which the highway is located and furnish them a verified copy of the approved plans and specifications and the said governing body shall proceed to advertise for bids and let the contract for construction in the manner provided for by the statutes for advertising and letting contracts for work on public highways by counties.

Should the bids for constructing the highways exceed the figure mutually agreed upon between the department and the county engineer as a reasonable compensation for the work the bids shall be rejected and the work be done as the department shall direct. In either case the county surveyor shall represent the department in the supervision of the construction. Whenever the department deems it necessary, it may appoint an inspector.

Sec. 5. Payment for the work shall be made by the local governing body in the manner provided by law for the payments of claims against the county for work of this class, on presentation of bills verified by the supervising engineer and approved by the department. The cost of construction shall include therein the cost of the surveys, drafting, engineering, inspection and other necessary expenses as well as the cost of the actual work of construction. Two-thirds of the cost of construction as shown by the bills approved by the department shall be paid by the county in which the highway is located and one-

third by the state. The cost of maintenance thereafter shall be equally divided between the state and the county, the work to be done as the department shall direct under the supervision of the county engineer. All bills for maintenance shall be approved and paid in the same manner as the cost of construction.

On the tenth of each month following the month in which work of any kind has been done, or expenses of any sort have been incurred in connection with the construction or maintenance of a state aid highway, the treasurer of the county where the highway is situated shall present to the department a verified statement of the amounts paid for work performed during the previous month and a demand for a payment of the amount due from the state. Upon verification and approval of this demand the state treasurer shall forward the amount to the county treasurer. The amount to be paid by a county may be paid out of the proceeds of a bond issue, the general fund, the general road district fund or out of the district funds of the road district in which the said highway is located.

The proportion of expense borne by the state shall be paid out of any fund now available, or which may hereafter be made available for the purpose, or out of special appropriations for the purpose made by the legislature.

Moneys shall be paid by the state treasurer upon warrants duly drawn by the controller of the state, upon demands made by the department and audited by the state board of control.

Sec. 6. The board of supervisors of any county may not, under the provisions of this act, petition

for the improvement of any highway the estimated cost of which by the county surveyor or engineer of said county shall exceed the sum of fifty thousand dollars, unless the same shall have been submitted to the electors of the county and approved. The board of supervisors is hereby authorized to issue bonds under the laws of this state for the construction of such highways and the approval of such bond issue by the electors shall authorize the board of supervisors to proceed with the construction of such highway under the provisions of this act.

Sec. 7. All of the provisions of law relating to state highways and to the department shall apply so far as they are applicable to all work done and to all methods employed under this act.

Sec. 8. This act shall be known and cited as the "State Aid Highway Act."

STATUTES OF CALIFORNIA, 1919, PAGE 138.

Section 1. The several counties, municipalities and road divisions of this state, within the limits of which may exist a state highway or highways under the jurisdiction and control of the state engineering department, are hereby empowered to do or order to be done on such highways any paving, curbing, street work or sewer work authorized by law; *provided, however,* that permission to do any such work shall first be obtained from the state department of engineering and all grades, elevations or curb lines sought to be established or pavement proposed to be constructed by any county, municipality or road division shall first be approved by said engineering department of the state; *and provided, further,* that in case any existing pavement should be injured as

a result of such work, such pavement shall be restored to the satisfaction of said engineering department.

STATUTES OF CALIFORNIA, 1923, PAGE 123.

SECTION 1. The board of supervisors of any county may by a four-fifths vote determine by resolution that the proposed improvement of a street or portion of street within an incorporated city is of general county interest and that county aid should be extended therefor. Such resolution must refer to the street or portion of street, the general nature of the improvement proposed and the nature of the aid to be furnished by the county and the fund from which it is to be paid.

Thereafter and in accordance with such resolution the county may give aid in one or more of the following ways; viz, it may contribute money, acquire material and deliver the same, furnish engineering services or labor, or loan its road-building machinery. The expense of such aid may be paid from the general fund, the general road fund or the fund composed of moneys received from the state pursuant to the vehicle act.

All moneys, materials and other aid so received by the city must be used by it in the improvement described in the resolution and any portion thereof not used shall be returned to the county.

SEC. 2. The board of supervisors of any county in the state may by resolution adopted by a four-fifths vote declare any highway in the county, whether lying in whole or in part within an incorporated city, to be a part of the county system of highways. A copy of such resolution shall be forwarded to the governing body of the municipality

within which the highway lies. Such governing body may consent to the establishment of such portion of such highway as lies within the limits of the city as a part of the county system of highways and upon the taking effect of an ordinance containing such consent such portion of such highway shall become and be a part of the county system of highways and shall thereafter be considered with respect to its construction, maintenance and repair a county highway and not a city street. Thereafter the board of supervisors of the county may improve such highway and maintain the same as other county highways are improved and maintained, and pay therefor out of the general fund, general road fund or fund composed of moneys received from the state pursuant to the terms of the vehicle act. *Provided, however,* that nothing herein contained shall be construed as limiting in any manner the police power of any municipality with reference to any such street or portion of street, improved under the provisions of this act.

SEC. 3. The board of supervisors of any county may at any time after all or a portion of a city street becomes a part of a county system of highways, as in this act provided, adopt a resolution declaring that such street or any portion thereof is no longer a part of such county system. Ten days after the filing of such resolution with the clerk of the city within which the street lies, such street, or the portion thereof described in the resolution, shall cease to be a part of the county system of highways.

SECTION 4041 OF THE POLITICAL CODE OF THE STATE OF CALIFORNIA.

The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law:

4. To acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes and other public ways, and to lay out, maintain, control, construct, repair, and manage public roads, boulevards, highways, turnpikes and other public ways, and to incur a bonded indebtedness for any such purposes; *provided,* that no such indebtedness shall be incurred for any of such purposes until after the question of the issue of bonds therefor shall have been submitted to the qualified electors of the county, at a special election called for that purpose, and two-thirds of the electors of the county voting at such election shall have voted in favor of issuing such bonds; said election to be called and held and said bonds, if authorized, to be issued, sold and made payable in the manner and form prescribed by section four thousand eighty-eight of this code. Said board shall also have power to make and enforce rules and regulations for the protection, management, control and use of such public boulevards, roads, highways, turnpikes and other public ways. Such boards shall also have power to expend from the general fund of the county such moneys as may be necessary to pay the whole or any part of the cost of the improvement of that portion of any street, highway, lane, alley, court, or other public place within any incorporated city of the

county, upon which abuts any real property of the county used for public purposes, not exceeding the amount, however, which, but for such public ownership and use, would be properly chargeable to and assessed against such real property under the provisions of the law governing such work or improvement; *provided,* no liability shall be created against the county in connection with any such work or improvement unless, prior to the commencement thereof, or to the letting of any contract therefor, the board shall, by resolution, determine and declare the amount to be so expended and direct that such sum be set apart and reserved out of any moneys in the general fund available for such purpose, to be used exclusively for paying the cost of such work or improvement.

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